

NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 03-201-13

***Habitat Conservation and Restoration
Essential Fish Habitat Policy***

FINDING WITH MMS REGARDING EFH CONSULTATIONS

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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

MAR 12 2002

Mr. Tom Readinger
Deputy Director of Offshore Minerals Management
Department of Interior
1849 C Street, NW
Washington, DC 20240-0001

Dear Mr. Readinger:

Pursuant to section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), Federal agencies are required to consult with the National Marine Fisheries Service (NMFS) on any action that may result in adverse effects to essential fish habitat (EFH). Under the Outer Continental Shelf Lands Act (OCSLA; 43 U.S.C. 1331 *et seq.*), the Minerals Management Service (MMS) is responsible for leasing tracts on the outer continental shelf (OCS) for prospecting and access to non-energy mineral resources (sand, gravel or shell) and for oil and gas exploration, development, and production. Certain OCS activities authorized by MMS may result in adverse effects to EFH, and therefore require EFH consultation. Actions taken by MMS under OCSLA are evaluated through the National Environmental Policy Act (NEPA). To streamline environmental review requirements, MMS and NMFS staff have worked cooperatively to develop procedures to incorporate EFH Consultation into their existing NEPA process, and MMS may incorporate EFH consultation into their NEPA process, as follows.

Background

The Essential Fish Habitat regulations at 50 CFR 600.920(f) enable NMFS to make a finding that an existing consultation or environmental review procedure can be used to satisfy the Magnuson-Stevens Act consultation requirements if the procedure meets the following criteria: 1) the existing process must provide NMFS with timely notification of actions that may adversely affect EFH; 2) notification must include an assessment of the impacts of the proposed action on EFH that meets the requirements for EFH Assessments discussed in section 600.920(e); and 3) NMFS must make a finding pursuant to 50 CFR 600.920(f)(3) that the process satisfies the requirements of sections 305(b)(2) and 305(b)(4) of the Magnuson-Stevens Act. NEPA regulations direct Federal agencies to prepare draft EIS's concurrently with and integrated with other environmental impact analyses to the fullest extent practicable (40 CFR 1502.25 and 40 CFR 1506.4). These regulations are complementary, allowing MMS to streamline its various consultation responsibilities.

Finding

This document serves as NMFS' finding that MMS may choose to use the NEPA process by submitting to NMFS programmatic, lease sale, or project-specific environmental impact statements (EIS's) or environmental assessments (EA's), as appropriate, in lieu of a stand alone



EFH assessment. Alternatively, MMS may use the consultation procedures outlined in the EFH regulations (50 CFR 600.920) if MMS decides that for a given project, the following processes do not allow for efficient completion of EFH consultation.

The NMFS Southeast Regional Office (SERO) consulted with the MMS Gulf of Mexico Region Office (GOMR) in preparing a NMFS regional finding for the GOMR, dated March 12, 2000. That regional finding also allows MMS GOMR to incorporate EFH assessments into NEPA documents. The March, 2000 EFH finding was based, in part, on prior MMS GOMR Programmatic level consultations. NMFS SERO and MMS GOMR consulted on a programmatic level, by letters of July 1, 1999, and August 12, 1999, to address EFH issues for certain MMS OCS activities in the Gulf of Mexico (plans of exploration, easements, rights-of-way, platform removals, etc.), and that programmatic consultation remains in effect. This national finding does not conflict with or supersede the existing regional EFH finding, nor is it intended to preclude any future regional EFH findings.

- Timely notification:

Sec. 600.920(f)(1)(i) of the EFH regulations states that any existing process a Federal agency uses to complete EFH consultations must provide NMFS with timely notification of actions that may adversely affect EFH. NMFS should have at least 60 days notice prior to a final decision on an action. Additionally, EFH regulations allow NMFS and the action agency to agree to use shorter time frames if they allow sufficient time for NMFS to develop EFH Conservation Recommendations. Such an agreement may be necessary in the case of the OCS Lands Act, which requires MMS to make a decision on exploration plans within 30 days of receiving an exploration plan (30 CFR 250.203(i)). NEPA regulations at 40 CFR 1501.2 require agencies to integrate the NEPA process with other planning at the earliest possible time to insure that planning decisions reflect environmental values, to avoid delays later in the process, and to avoid potential conflicts. MMS will notify NMFS regarding a proposed action that may adversely affect EFH by providing a copy of a draft EIS at the beginning of the NEPA required 45 day public comment period for all draft EIS's. In the event MMS prepares an EA for a proposed action that requires an EFH consultation, MMS may provide NMFS a draft copy of the EA or a stand alone EFH assessment. Regardless of whether the consultation is at a programmatic or project specific level, this process allows MMS to provide NMFS with sufficient notification regarding the effects of the proposed action.

In general, MMS should initiate EFH coordination as early as possible so that NMFS and MMS can work together to evaluate and minimize potential adverse effects on EFH.

- EFH Assessment:

MMS will include in the draft NEPA document (EIS or EA) the information as outlined in 50 CFR 600.920(e), including a description of the proposed action, an analysis of the potential adverse effects of the action on EFH and the managed species, MMS's conclusions regarding the effects of the action on EFH, and proposed mitigation, if applicable. The EFH Assessment information will be clearly identified in a separate section or clearly referenced in the draft

NEPA document. In the event MMS prepares an EA for a proposed action that requires an EFH consultation, MMS may provide NMFS a stand alone EFH assessment.

- **EFH Conservation Recommendations:**

Under section 305(b)(4)(A) of the Magnuson-Stevens Act, NMFS is required to provide EFH Conservation Recommendations for actions that would adversely affect EFH. NMFS will provide EFH Conservation Recommendations to MMS within the public comment period for the draft EIS or within 30 days of receiving a draft EA. To the extent practicable, MMS and NMFS should coordinate throughout the NEPA and EFH consultation process regarding possible adverse effects to EFH and potential measures for avoiding or mitigating those effects to ensure any conservation measures that NMFS may recommend are feasible and within MMS's authority to control and implement.

- **MMS Response:**

Pursuant to section 305(b)(4)(B) of the Magnuson-Stevens Act and 50 CFR 600.920(k), a Federal action agency must provide a detailed response to NMFS in writing within 30 days after receiving EFH Conservation Recommendations. The MMS response will include a description of measures proposed for avoiding, mitigating, or offsetting the impact of the activity on EFH. In the case of a response that is inconsistent with the EFH Conservation Recommendations, the response must explain the reasons for not following the recommendations, including the scientific justification for any disagreements with NMFS over the anticipated effects of the proposed action and the measures needed to avoid, minimize, mitigate, or offset such effects. MMS must provide its response at least 10 days prior to final approval of the action if the response is inconsistent with any of NMFS' EFH Conservation Recommendations, unless NMFS and MMS agree to use an alternative time frame for the response. In the event that timing necessitates, MMS may provide an interim response, stating that MMS has not yet made a final decision on NMFS' recommendations, and then MMS will send a final response to NMFS prior to its final decision on the action.

Pursuant to 50 CFR 600.920(k)(2), if an MMS decision is inconsistent with a NMFS EFH Conservation Recommendation, NMFS may request a meeting with MMS to discuss the proposed action and seek opportunities to try to resolve any disagreements. Efforts to resolve any differences should begin at the regional level of both MMS and NMFS.

Conclusion

If you agree with the procedures described above, please respond by letter indicating your concurrence. NOAA is presently working with MMS to determine whether and how to expand the OCSLA scope to other alternative energy projects. If that effort expands MMS's decision-making role, then further discussion between NMFS and MMS may be necessary to determine

whether it is appropriate to expand this finding to encompass the new OCSLA activities, and allow the associated EFH consultation process to be integrated into the NEPA process. Should you or your staff have any questions, please contact Korie Johnson at (301) 713-2325.

Sincerely,

A handwritten signature in black ink, appearing to read "Rolland A. Schmitten", with a long horizontal flourish extending to the right.

Rolland A. Schmitten
Director
Office of Habitat Conservation



United States Department of the Interior

MINERALS MANAGEMENT SERVICE
Washington, DC 20240



APR 4 2002

Mr. Rolland A. Schmitten
Director, Office of Habitat Conservation
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, Maryland 20910-3282

Office of Habitat Conservation

APR 10 2002

Received

Dear Mr. Schmitten:

The Minerals Management Service agrees with the procedures described in your March 12, 2002, letter for conducting essential fish habitat consultations as required by the Magnuson-Stevens Fishery Conservation and Management Act. We appreciate the cooperation of your staff in working with us to develop procedures that meet the consultation requirements of the Act while also satisfying our requirements for permitting mineral resource activities in a timely manner.

Dr. Kay Briggs, Environmental Division, has worked closely with Ms. Korie Johnson, National Marine Fisheries Service, in the preparation of your letter of finding. If you have any questions concerning this matter, please contact Dr. Briggs at (703) 787-1646.

Sincerely,

Michael Hunt

Thomas A. Readinger
Associate Director for
for Offshore Minerals Management

